

**Use of the Defense Production Act to
Reduce Interruptions in Critical Infrastructure and
Key Resource Operations During Emergencies**



April 25, 2008

Table of Contents

Executive Summary	.....	ES-1
1. Introduction	.....	1
1.1. Purpose and Scope	.....	1
1.2. Background	.....	1
1.2.1. Protection of Critical Infrastructure and Key Resources (CI/KR)	.....	1
1.2.2. Defense Production Act	.....	3
1.2.3. Defense Priorities and Allocations System	.....	4
1.3. Report Organization	.....	5
2. Planning for CI/KR Protection and Restoration	.....	6
2.1. Emergency Preparedness Planning	.....	6
2.2. Department of Homeland Security	.....	7
2.3. Department of Defense	.....	7
2.4. Department of Energy	.....	8
3. Priorities and Allocations	.....	10
3.1. Department of Agriculture	.....	10
3.2. Department of Commerce	.....	11
3.3. Department of Defense	.....	12
3.4. Department of Energy	.....	14
3.5. Department of Health and Human Services	.....	15
3.6. Department of Homeland Security	.....	16
3.7. Department of Transportation	.....	17
3.8. Use of Priorities and Allocations for Protection and Restoration of CI/KR	.....	18
3.8.1. Industrial Resources	.....	18
3.8.2. Civil Transportation	.....	19
3.8.3. Energy Resources	.....	19
3.9. Conclusion	.....	20
Appendix A. Acronyms	.....	A

Executive Summary

This is a report on actions taken by the Federal Government, using the priorities and allocations authority provided in Section 101 of the Defense Production Act of 1950 (DPA), to ensure the preparedness of industry to reduce interruption of critical infrastructure and key resource (CI/KR) operations under emergency conditions. This report was prepared in accordance with Subsection 1002(b) of the Implementing Recommendations of the 9/11 Commission Act of 2007 (Public Law 110-53). The Department of Homeland Security (DHS) developed this report in cooperation with the Departments of Agriculture (USDA), Commerce (DOC), Defense (DOD), Energy (DOE), Health and Human Services (HHS), and Transportation (DOT). This report represents a consensus among the interagency group.

Section 101 authorizes the President to require acceptance and priority performance of contracts or orders and to allocate materials, services, and facilities to promote the national defense or to maximize domestic energy supplies. Executive Order 12919 delegates the President's priorities and allocations authorities among USDA, DOC, DOD, DOE, HHS, and DOT with respect to different types of resources. It provides that the priorities and allocations authorities may only be used for programs that have been determined by DOD, DOE, and DHS to be "necessary or appropriate to promote the national defense." E. O. 12919 also directs DOC to administer the Defense Priorities and Allocations System (DPAS), which provides guidance and procedures for the acceptance and preferential performance of contracts or orders for industrial resources under DOC's resource jurisdiction. The DPAS system is used by other Federal departments and agencies, foreign governments, and industry, when authorized by DOC, to ensure timely delivery of industrial resources needed to support programs determined as necessary or appropriate to promote the national defense by DOD, DOE, or DHS.

The DPA's definition of "national defense" was amended in 2003 to include the term "critical infrastructure protection and restoration." The DPA Declaration of Policy (50 USC App. 2062(b)) and DPA authorities focus on DOD acquisition needs and support for major military conflicts overseas. However, DPA authorities, particularly Section 101 authorities, have been used to support critical infrastructure protection and restoration by other, non-DOD agencies. Examples of such use are provided in this report. DPA authorities, including the priorities and allocations authority, have been incorporated into the National Preparedness Guidelines, the National Response Framework (NRF), and the National Infrastructure Protection Plan (NIPP). In addition, Federal departments with authority for priorities and allocations have been updating their procedures to use this authority for preparedness and CI/KR-related activities. DOC, which administers a priorities and allocations system that is actively being used at this time, has updated its DPAS regulation and issued a new delegation of DPAS authority to DHS to provide for use of priority ratings on contracts for industrial resources in support of critical infrastructure protection and restoration. USDA, DOE, and DOT also have priorities and allocations systems, if needed. USDA is revising its system. HHS is in the process of developing a priorities and allocations system.

1. Introduction

1.1. Purpose and Scope

This report represents an interagency effort required by subsection 1002(b) of the Implementing Recommendations of the 9/11 Commission Act of 2007 (Public Law 110-53). Subsection 1002(b) directs the Secretary of Homeland Security to submit an annual report to Congress on actions taken by the Federal Government to ensure, in accordance with Subsections (a) and (c) of Section 101 of the Defense Production Act of 1950 (DPA) (50 U.S.C. App. 2071, *et seq.*), the preparedness of industry to reduce interruption of critical infrastructure and key resource (CI/KR)¹ operations during an act of terrorism, natural catastrophe, or other similar national emergency.² The report focuses on planning to protect and restore CI/KR and implementation of the DPA Section 101 authority for these purposes.

This report was prepared by the Department of Homeland Security (DHS), in cooperation with the Departments of Agriculture (USDA), Commerce (DOC), Defense (DOD), Energy (DOE), Health and Human Services (HHS), and Transportation (DOT). It represents a consensus among the interagency group. This report is being submitted to the Senate committees on Banking, Housing, and Urban Affairs and Homeland Security and Governmental Affairs and the House committees on Financial Services and Homeland Security.

Development of this report involved: (1) interagency meetings to provide direction and coordination for the drafting of each department's input; (2) drafting of each department's input by personnel engaged in DPA programs and CI/KR protection activities; (3) integrating inputs into a single report; and (4) review and approval of the consolidated report by the departments whose actions are described in this report.

1.2. Background

1.2.1. Protection of Critical Infrastructure and Key Resources (CI/KR)

Protection of the Nation's critical infrastructure and key resources is one of the core missions of the Department of Homeland Security. Through the efforts of its Office of Infrastructure Protection (DHS/IP), DHS is in the forefront of ensuring industry preparedness to reduce interruption of CI/KR operations. DHS works with industry on a daily basis to reduce both the

¹ As defined in the Homeland Security Act of 2002, key resources are "publicly or privately controlled resources essential to the minimal operations of the economy and government."

² Subsection 1002(b) reads as follows: "(b) Report on Industry Preparedness.--Not later than 6 months after the last day of fiscal year 2007 and each subsequent fiscal year, the Secretary of Homeland Security, in cooperation with the Secretary of Commerce, the Secretary of Transportation, the Secretary of Defense, and the Secretary of Energy, shall submit to the Committee on Banking, Housing, and Urban Affairs and the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Financial Services and the Committee on Homeland Security of the House of Representatives a report that details the actions taken by the Federal Government to ensure, in accordance with Subsections (a) and (c) of Section 101 of the Defense Production Act of 1950 (50 U.S.C. App. 2071), the preparedness of industry to reduce interruption of critical infrastructure and key resource operations during an act of terrorism, natural catastrophe, or other similar national emergency."

likelihood and consequences of interruptions to CI/KR operations due to terrorism, natural catastrophes, or other national emergencies.

Policies for CI/KR protection and preparedness are established through a number of statutes, executive orders, Presidential directives, and national strategies. Chief among these are: the Homeland Security Act of 2002; Homeland Security Presidential Directive (HSPD) 7 (“Critical Infrastructure Identification, Prioritization, and Protection”); the National Strategy for Homeland Security of 2007; the National Strategy for the Physical Protection of Critical Infrastructure and Key Assets; the National Strategy for Securing Cyberspace; and the Defense Production Act.

HSPD-7 charges the Secretary of Homeland Security with responsibility for coordinating the national effort to enhance CI/KR protection. The directive also designates Sector-Specific Agencies (SSAs) with responsibility for coordinating planning, preparedness, and protection activities within each of the 17 CI/KR sectors. This approach provides the structure needed to address the unique characteristics and operating models of each of the sectors. The 17 CI/KR sectors and the SSAs are listed in Table 1-1.

TABLE 1-1. Sector-Specific Agencies for CI/KR

Sector-Specific Agency	CI/KR Sector
Department of Agriculture ³	Agriculture and Food
Department of Health and Human Services ⁴	
Department of Defense	Defense Industrial Base
Department of Energy ⁵	Energy
Department of Health and Human Services	Public Health and Health Care
Department of the Interior	National Monuments and Icons
Department of the Treasury	Banking and Finance
Environmental Protection Agency	Drinking Water and Water Treatment Systems
Department of Homeland Security <i>Office of Infrastructure Protection</i>	Chemical Commercial Facilities Dams Emergency Services Nuclear Reactors, Materials, and Waste Information Technology Telecommunications Postal and Shipping Transportation Systems ⁷
<i>Office of Cyber Security and Telecommunications</i>	
<i>Transportation Security Administration</i>	
<i>Transportation Security Administration/U.S. Coast Guard⁶</i>	
<i>Immigration and Customs Enforcement/Federal Protective Service</i>	
	Government Facilities

³ The Department of Agriculture is responsible for agriculture and food (meat, poultry, and egg products).

⁴ The Department of Health and Human Services is responsible for food other than meat, poultry, and egg products.

⁵ The Energy Sector includes the production, refining, storage, and distribution of oil, gas, and electric power, except for commercial nuclear power facilities.

⁶ The U.S. Coast Guard is the SSA for the maritime transportation mode.

⁷ As stated in HSPD-7, the Department of Transportation and the Department of Homeland Security collaborate on all matters relating to transportation security and transportation infrastructure protection.

DHS uses the overarching framework of the National Infrastructure Protection Plan (NIPP) and the associated Sector-Specific Plans (SSPs) to lead and coordinate the risk-based approach and sector partnership model used by government and private sector partners to identify, assess, and prioritize the implementation of risk-reduction and protective measures.

1.2.2. Defense Production Act

The Defense Production Act provides a number of important authorities to expedite and expand the supply of critical resources from the U.S. industrial base to support the national defense. These authorities are focused primarily on DOD acquisition needs and support for military conflicts overseas. Except for changes to the DPA definition of “national defense” to include “emergency preparedness activities” conducted pursuant to title VI of the Stafford Act and “critical infrastructure protection and restoration,” virtually no other changes have been made to DPA Declaration of Policy or authorities to address homeland security missions, including protection of CI/KR operations.

The DPA Declaration of Policy speaks of maintaining the superiority of “defense equipment,” “continuing international problems,” “defense preparedness programs,” “industrial mobilization,” “actions outside the U.S.,” “military production,” “sustaining U.S. Armed Forces,” “mobilization requirements,” and “defense acquisition.” It does not mention “terrorism,” “natural catastrophes,” or “homeland security.” DPA authorities are little changed from the original provisions designed to support a major and prolonged mobilization to support major military operations overseas.

Subsection 1002(b) of the Implementing Recommendations of the 9/11 Commission Act of 2007 specifically refers to the authorities in DPA Subsections 101(a) and 101(c). These Subsections authorize the President to: (1) require acceptance and preferential performance of contracts or orders (other than contracts of employment) that he deems necessary or appropriate to promote the national defense or to maximize domestic energy supplies; and (2) allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense or to maximize domestic energy supplies.

The President’s priorities and allocations authorities under DPA subsection 101(a) are delegated to the following department heads in subsection 201(a) of E.O. 12919 (National Defense Industrial Resources Preparedness):

- (1) The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer;
- (2) The Secretary of Energy with respect to all forms of energy;
- (3) The Secretary of Health and Human Services with respect to health resources;
- (4) The Secretary of Transportation with respect to all forms of civil transportation;
- (5) The Secretary of Defense with respect to water resources; and

- (6) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

Section 202 of E.O. 12919 provides that section 201(a) authority may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense by:

- (1) DOD with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities;
- (2) DOE with respect to energy production and construction, distribution and use, and directly related activities; and
- (3) DHS with respect to essential civilian needs supporting national defense, including civil defense and continuity of government and directly related activities.

In general, proposed uses of DPA Section 101 authority for protection and restoration of most types of critical infrastructure must first be determined by DHS to be “necessary or appropriate to promote the national defense,” although DOD or DOE could approve defense or energy-related uses, as appropriate.

1.2.3. Defense Priorities and Allocations System

DPA authority to issue priority ratings to support the timely delivery of industrial resources is implemented through the DPAS regulation (15 CFR part 700). This regulation is administered by DOC, in consultation with the heads of the departments and agencies specified in Subsection 201(a) of E.O. 12919, and is used, as authorized by DOC, by other Federal departments and agencies, and industry to support programs necessary or appropriate to promote the national defense, including critical infrastructure protection and restoration. The key elements of the DPAS regulation are mandatory acceptance of rated orders, preferential scheduling, and extension of priority ratings.

DOC has delegated specific priority rating authority with respect to industrial resources to DOD, DOE, the General Services Administration (GSA), and DHS. DOD implements its priority rating authority as a standard clause in most of its contracts and orders for industrial resources. Use of the priority rating authority by the other three agencies is limited. DOE and GSA use their authority, primarily, in support of DOD-approved programs. DHS uses its authority in support of emergency preparedness and critical infrastructure protection and restoration activities.

The DPAS cannot be used to prioritize food, energy, health, water, and civil transportation resources. However, DOC could authorize use of the DPAS, if approved by DOD, DOE, or DHS, to expedite the delivery of industrial resources under its jurisdiction, if needed to support USDA, DOE, HHS, DOD, or DOT.

1.3. Report Organization

The rest of this report is organized into two chapters. Chapter 2 provides a brief description of several major emergency preparedness planning efforts, both Government-wide and within several Federal departments, to address critical infrastructure protection and restoration. Chapter 3 summarizes Federal actions to implement the DPA priorities and allocations authority in support of CI/KR operations.

2. Planning for CI/KR Protection and Restoration

This chapter highlights a number of key elements of emergency preparedness planning efforts, both Government-wide and within several Federal departments, to address CI/KR protection and restoration.

2.1. *Emergency Preparedness Planning*

DHS is responsible for coordinating most interagency emergency preparedness planning efforts and CI/KR protection programs, including the National Preparedness Guidelines, the National Response Framework (NRF), and the NIPP. All of these planning documents address reducing interruptions of CI/KR operations under emergency conditions.

The National Planning Scenarios are among the key elements of the National Preparedness Guidelines⁸. The scenarios form the basis for coordinated Federal planning, training, exercises, and grant investments needed to prepare for emergencies of all types. The strategic plans for these scenarios are currently being revised and updated. Each of the updated plans mentions DPA authorities in the base plan and addresses these authorities, including the Section 101 authorities, in more detail in the “Administration and Resources” section. Drafts of the strategic plans for five of the scenarios have been completed (as of December 2007).

The NRF⁹ provides a guide to all-hazards incident response. The Framework commits the Federal Government to complete both strategic and operational plans for the 15 National Planning Scenarios. The Critical Infrastructure and Key Resource Support Annex to the Framework highlights the importance of the DPA in providing specific authority to expedite deliveries and strengthen production capabilities for CI/KR protection and restoration activities.

Homeland Security Presidential Directive (HSPD) 7 is implemented through the NIPP¹⁰. The NIPP describes the risk management framework used by DHS and other Federal agencies to identify, assess, and prioritize risks to CI/KR. It also describes the sector partnership model that enables these government agencies to work effectively with the private sector to manage CI/KR risks. The NIPP partnership framework allows DHS to provide national leadership and cross-sector oversight, while the Federal Sector-Specific Agencies manage specific CI/KR protection activities in their sectors. Using this framework, DHS, the SSAs, and other government and private sector partners are implementing consistent processes to:

⁸ See http://www.dhs.gov/xprepresp/publications/gc_1189788256647.shtm.

⁹ See <http://www.fema.gov/emergency/nrf/mainindex.htm>.

¹⁰ See http://www.dhs.gov/xprevprot/programs/editorial_0827.shtm.

- Improve CI/KR preparedness and protective measures;
- Develop and reinforce plans through training and exercises;
- Implement DPA authorities in support of CI/KR protection and restoration activities; and
- Strengthen capabilities to develop and share threat, protective measure, and other relevant information and analyses.

2.2. *Department of Homeland Security*

The Office of Infrastructure Protection (DHS/IP) provides leadership and coordination for the national effort to reduce the risk to the Nation's CI/KR posed by acts of terrorism and to strengthen national preparedness, timely response, and rapid recovery in the event of an attack, natural disaster, or other emergency. DHS/IP utilizes various authorities to implement its mission and to foster private sector preparedness. The Defense Production Act offers important authorities in support of the protection and preparedness missions. DHS/IP has taken aggressive measures to understand and incorporate DPA provisions in CI/KR planning efforts, as well as in its training and exercises.

DHS/IP, in collaboration with private sector and government security partners, has taken preparatory actions to support use of DPA authorities to reduce interruptions in CI/KR operations. These actions include:

- Working with the Federal Emergency Management Agency (DHS/FEMA) to develop and institute procedures to enable use of the DPA authorities, when needed and appropriate, to reduce interruptions of CI/KR operations;
- Incorporating the DPA as a key authority described in the NIPP, the Sector Specific Plans (SSPs), and the CI/KR Support Annex to the NRF;
- Developing a process to coordinate and address requests for assistance from private sector CI/KR owners and operators that recognizes the use of the DPA as a potential tool to address incident-related disruptions; and
- Conducting workshops, technical assistance sessions, and briefings with the Partnership for Critical Infrastructure Security, Sector Coordinating Councils, and other private sector partners to raise awareness of the process for requesting assistance and the applicability of the DPA.

2.3. *Department of Defense*

HSPD-7 assigns two broad responsibilities to DOD associated with limiting and managing risks to CI/KR operations. DOD is designated as the Sector-Specific Agency for the Defense Industrial Base (DIB), and the United States Army Corps of Engineers (USACE) plays a significant role in the Water and Dams sectors under the Sector-Specific Agency lead of the

Environmental Protection Agency (EPA) and Department of Homeland Security (DHS), respectively. USACE is also the lead for Emergency Support Function #3 (Public Works and Engineering) under the National Response Framework (NRF). DOD does not normally employ DPA authorities in its Critical Infrastructure Protection Program. However, if a defense contractor is faced with supply constraints when attempting to improve physical security or to rebuild after an incident, DOD may authorize the contractor, in accordance with DOC's DPAS Delegation to DOD, to place priority rated contracts and orders to ensure timely delivery of needed industrial resources.

DOD has developed the DIB Sector Assurance Plan and DIB SSP. The DIB Sector Assurance Plan outlines an approach that focuses on steps to identify a list of critical assets that, if damaged or destroyed, will result in unacceptable consequences. It also sets forth the process used to prioritize those critical assets based on a risk assessment process; perform vulnerability assessments on high-priority critical assets; and encourage industry actions to remediate or mitigate adverse effects found during these assessments. The DIB SSP outlines DOD's approach to executing its sector-specific responsibilities, follows guidance established by DHS, and complements other DOD critical infrastructure policy.

The USACE has established the Critical Infrastructure Security Program (CISP) to address the security needs under potential terrorist threat scenarios of all the USACE infrastructures, including administration buildings and laboratory facilities. USACE and DHS/FEMA representatives have met to discuss potential use of DPA authorities in support of USACE programs.

2.4. *Department of Energy*

DOE is the lead Federal agency for energy resources. In coordination with DHS, DOE is tasked with the responsibility of protecting U.S. energy infrastructure, establishing policies and procedures regarding preparedness for, and prevention of, interruptions in U.S. energy supplies caused by natural and man-caused disasters, and promoting effective response and recovery actions to mitigate disruptions and shortfalls of energy supplies caused by such disasters.

Within DOE, the Office of Electricity Delivery and Energy Reliability (OE) is responsible for protecting CI/KR in the energy sector. OE's role includes responding to, and preparing for, energy emergencies resulting from all hazards. OE has lead responsibilities for Emergency Support Function (ESF) #12 (Energy) of the NRF.¹¹ The purpose of ESF #12, when activated by DHS, is to facilitate the restoration of damaged energy systems and components for incidents requiring a coordinated Federal response.

Within OE, the Infrastructure Security and Energy Restoration Division (ISER) leads the Federal government's effort to ensure a robust, secure, and reliable energy infrastructure. This division supports HSPDs 7 and 8, which require DOE to protect critical energy assets and assist state and

¹¹ According to the NRF, Emergency Support Functions (ESFs) "provide the structure for coordinating Federal interagency support for a Federal response to an incident. They are mechanisms for grouping functions most frequently used to provide Federal support to States and Federal-to-Federal support, both for declared disasters and emergencies under the Stafford Act and for non-Stafford Act incidents."

local governments to prepare for, and respond to, disruptions in energy supplies. ISER's programs improve the ability of energy sector stakeholders to prevent, prepare for, and respond to threats, hazards, and supply disruptions. In recent years, ISER has responded to Hurricanes Isabel, Charley, Frances, Ivan, Jeanne, Dennis, and Katrina, and the August 2003 Northeast U.S. blackout. It has also trained state legislators and first responders, analyzed natural gas disruptions, and helped develop the NRF.

3. Priorities and Allocations

Federal departments, both individually and collectively, have taken a number of actions to implement DPA Section 101 authorities in support of CI/KR protection and restoration in recent years. Beginning in 2003, shortly after the DPA definition of “national defense” was amended to include “critical infrastructure protection and restoration,” and continuing to the present, representatives of the Federal departments with delegated DPA authorities and responsibilities have met periodically to review DPA delegations and guidance with regard to CI/KR protection and restoration. DPA authorities, including the priorities and allocations authority, have been incorporated into Federal emergency preparedness plans.

Currently, DOC administers the only priorities and allocations system (the DPAS) that is actively being used to support approved national defense programs, including critical infrastructure protection and restoration. USDA, DOE, and DOT have priorities and allocations systems, if needed. USDA is revising its system. HHS is currently developing a priorities and allocations system. DHS is in the process of establishing more comprehensive policies and procedures to fully implement its priorities and allocations authorities. This chapter describes recent and ongoing actions in all of these areas.

3.1. *Department of Agriculture*

USDA is delegated DPA Section 101 authority with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer. These resources are outside the jurisdiction of the DPAS regulation.

The DPA, the Stafford Act, E.O. 12656 (Assignment of Emergency Preparedness Responsibilities), and E.O. 12919 authorize the Secretary of Agriculture to establish plans to provide for the continuation of agricultural production, food processing, storage, and distribution through the wholesale level and to place priorities on contracts for continuation of agricultural production during times of national emergency. USDA previously had established six Defense Food Orders (DFOs) for publication in the Code of Emergency Federal Regulations (CEFR). However, these DFOs are outdated and no longer fulfill emergency response and recovery requirements.

To address this issue and to support national defense programs, including domestic emergency preparedness and CI/KR protection and restoration, and also to fulfill the requirements of E.O. 12919, USDA is in the process of developing plans and regulations to establish and implement an Agriculture Priorities and Allocation System (APAS) pursuant to its DPA Section 101 authority. The APAS will support continuation of agricultural production by ensuring that agricultural producers, processors, distributors, and wholesalers receive preferential scheduling for items and processes necessary to maintain their agricultural operations during times of a declared national emergency.

Under an APAS, USDA would issue priority orders to private sector processors, distributors, and wholesalers as a means to redirect agricultural commodities to areas of hardship. By assigning priority rated orders, the Secretary of Agriculture would direct a supplier to fill orders in the

priority in which they are rated. Rated orders would take precedence over nonrated orders normally supplied by an individual or business. The purpose of this system would be to assist the free market in meeting USDA's needs in response to an emergency. The Secretary of Agriculture has assigned USDA's Farm Service Agency responsibility for preparing and implementing priorities and allocation requirements and for handling food claims received pursuant to DPA provisions.

Regulations for establishing and implementing the APAS are proceeding, and an interim rule is expected to be available for publication in the Federal Register in Calendar Year 2008. The APAS is being modeled on the DPAS regulation.

USDA has a memorandum of understanding in place with DOC separating duties and assignments for priorities and allocations in areas in which authorities may overlap. USDA also will cooperate with the DOE to develop an understanding for governing biofuels commodities during times of a declared emergency.

3.2. *Department of Commerce*

DOC is delegated authority, through E.O. 12919, to implement the DPA priorities and allocations provisions for industrial resources.¹² The Bureau of Industry and Security (DOC/BIS) administers this authority through the DPAS regulation. The purpose of the DPAS is to ensure the timely availability of industrial resources to meet current national defense and emergency preparedness program requirements and to provide an operating system to support rapid industrial response in a national emergency.

DOC/BIS has delegated authority to DOD, DOE, DHS, and the GSA, to place, in accordance with the DPAS regulation and under the authority of the Defense Production Act and E.O. 12919, priority ratings on contracts or orders for industrial resources to support programs determined by DOD, DOE, or DHS as "necessary or appropriate to promote the national defense." DOC/BIS may also authorize other government agencies, foreign governments, owners and operators of critical infrastructure, or companies to place priority ratings on contracts or orders for industrial resources on a case-by-case basis. Such requests must first be determined as "necessary or appropriate to promote the national defense" by DOD, DOE, or DHS.

All companies in the United States must comply with the provisions of the DPAS regulation. DOC/BIS has updated the DPAS regulation to reflect the December 2003 reauthorization of the Defense Production Act (Public Law 108-195). In July 2006, DOC/BIS revised the DPAS regulation to note that the definition of "national defense" was amended in the December 2003 reauthorization to include "critical infrastructure protection and restoration." DOC/BIS also revised the list published in Schedule I to the DPAS regulation of the programs approved for priorities and allocations support by adding the June 2006 list of approved Homeland Security programs (71 FR 39527, July 13, 2006).

¹² For the purposes of DPAS, "industrial resources" includes all materials, services, and facilities, including construction materials, the authority for which has not been delegated to other agencies under Executive Order 12919 (e.g., food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer; all forms of energy; health resources; all forms of civil transportation; and water resources).

DOC/BIS has taken action through the DPAS to support the protection, restoration, and recovery efforts of owner/operators of critical infrastructure. In September 2005, DOC/BIS authorized an owner/operator of critical infrastructure to place a priority rating on its orders to expedite the delivery of power generators and transfer switches needed to restore railroad operations in the New Orleans area after Hurricane Katrina. The company's request for authority to place a priority rating, in accordance with the DPAS regulation, on its order to facilitate repairs was endorsed by DHS/FEMA before DOC/BIS authorized the company to use the DPAS.

In July 2006, DOC/BIS authorized a company to place a priority rating on its contract in support of a critical infrastructure protection program. The company's request for authority to place a priority rating on its order to expedite the delivery of certain perimeter security surveillance equipment being deployed at a major airport and seaport terminal was endorsed by DHS/FEMA before DOC/BIS authorized the company to use the DPAS.

DOC/BIS has also authorized other Federal agencies, on a case-by-case basis, to place priority ratings on orders to expedite the delivery of industrial resources needed to enhance the protection of government facilities, a critical infrastructure sector. In addition, DOC's DPAS delegation to DOD provides that DOD may authorize persons to place rated orders for delivery of production or construction equipment required to support DOD approved programs and projects, when the equipment is necessary for the timely performance or completion of rated contracts or orders when timely delivery of the equipment cannot be obtained otherwise. DOD has authorized companies in the defense industrial base, a critical infrastructure sector, to place priority ratings on orders to expedite the delivery of industrial resources, including to support recovery from industrial accidents that have adversely impacted production capabilities.

DOC/BIS also actively participates in the national preparedness exercise program.

3.3. *Department of Defense*

DOD assigns responsibilities and establishes procedures for DOD's implementation of its DPA Section 101(a) authority in a directive and a manual. Priority ratings are authorized for contracts and orders that support programs, involving military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities, determined by the Under Secretary of Defense for Acquisition, Technology, and Logistics (acting pursuant to a delegation from the Secretary of Defense) as necessary or appropriate to promote the national defense.

DPAS Delegation 1 from DOC authorizes DOD to: (1) apply priority ratings to contracts and orders for industrial resources supporting approved national defense programs; and (2) request DOC to provide assistance to address problems that may arise in the execution of the DPAS, such as assisting in obtaining timely deliveries of items needed to satisfy rated orders or authorizing the use of priority ratings on contracts and orders to obtain items not automatically ratable under the regulation. DPAS Delegation 1 prohibits the rating of orders for materials and services that are commonly available in commercial markets for general consumption, do not require major modifications when purchased for approved program use, and are readily available in sufficient quantity so as to cause no delay in meeting approved program requirements. The

Delegation also prohibits the rating of contracts and orders for any items to be used primarily for administrative purposes, such as personnel or financial management.

DPAS Delegation 1 authority has been re-delegated by the Secretary of Defense to the heads of subordinate organizations in DOD Directive 4400.1, "Defense Production Act Programs." Recipients of this delegated authority have, in turn, re-delegated it within each DOD component down to the program level. DOD-wide guidance and procedures have been issued by the Under Secretary of Defense for Acquisition, Technology, and Logistics in DOD 4400.1-M, "Department of Defense Priorities and Allocations Manual," and have been supplemented, in several cases, by additional procedures issued by subordinate organizations. DOD 4400.1-M defines DPAS functions and responsibilities within DOD.

Except when prohibited by provisions of the DPAS regulation and DPAS Delegation 1, all DOD contracts and orders (including construction contracts and Foreign Military Sales contracts) are rated under the DPAS. DOD uses two levels of rating priority, identified by the rating symbols "DO" or "DX". All "DO" rated procurements have equal priority with each other and take precedence over unrated contracts and orders. All "DX" rated procurements have equal priority with each other and take precedence over "DO" rated and unrated contracts and orders. Only the Secretary and Deputy Secretary of Defense can authorize DOD programs to use a "DX" rating.

When DOD issues a priority rated contract or order for industrial resources to a contractor, the contractor is required to accept the order (except under certain circumstances specified in the DPAS regulation), schedule production and shipment to meet the specified delivery date(s), and issue rated orders to subcontractors for materials and services needed to complete the rated contract or order. The subcontractors, in turn, must include the priority rating in contracts and orders for components, parts, materials, and services down through the supply chain. The priority rating notifies contractors, suppliers, and their vendor base that they must give rated contracts and orders priority treatment over unrated business, when priority treatment is needed to meet the delivery dates of the rated contracts and orders.

DOD utilizes the DPA provisions to protect critical industrial infrastructure and continues to assess its utility for future needs.

- In June 2006, DOD authorized a company to place a priority rating on contracts to obtain items and associated services necessary to repair a large industrial motor needed to power its armor plate operations to meet urgent national defense requirements.
- In December 2007, at the request of DOD, DOD authorized a company to use a "DX" priority rating on its contracts and orders with U.S. contractors and suppliers in support of its vacuum induction melting and vacuum arc remelted capacity expansion project through the completion of the project.
- DOD is assessing the need to rate its contracts for the Rotating Equipment Isolation Device (REID). The REID hardware prevents an identified vulnerability in the nation's electric power grid.

3.4. *Department of Energy*

DOE derives its authorities and procedures with respect to DPA Subsections 101(a) and 101(c) from several documents. E.O. 12919 has the following provisions regarding use of priorities and allocations authority for energy resources:

- Section 201 delegates the President’s priorities and allocations authority with respect to “all forms of energy” to the Secretary of Energy;
- Section 202 states that Section 101 authority may only be used “with respect to energy production and construction, distribution and use, and directly related activities” to support programs that have been determined by the Secretary of Energy to be necessary or appropriate to promote the national defense; and
- Section 203 delegates the President’s authority under Subsection 101(c), which involves maximizing domestic energy supplies, to the Secretary of Commerce but also directs DOC to re-delegate the responsibility for a finding described in Subsection 101(c)(2)(A) to DOE.

DOE exercised its priorities and allocations authority for energy resources in January 2001, at the direction of the President, to assure the continued availability of natural gas supplies to high-priority uses in California. Certain natural gas suppliers were directed to sell natural gas to the Pacific Gas and Electric Company (PG&E) under terms and conditions consistent with existing contractual arrangements between PG&E and these suppliers. This use of priorities and allocations authority did not involve a potential interruption in critical infrastructure operations caused by a disaster.

DPAS Delegation 2 from DOC to DOE authorizes use of the DPAS in support of DOE approved programs, exercised in conjunction with programs approved for DPAS support by DOD (with respect to military production and construction, military assistance to any foreign nation, space, stockpiling, and directly related activities). Priority ratings are used by DOE on contracts/orders for programs conducted in conjunction with DOD’s military and space programs. DPAS Delegation 2 also authorizes DOE to make the required finding under DPA Section 101(c)(2)(A) involving use of priorities and allocations authority to maximize domestic energy supplies. 10 CFR Part 216 establishes the procedures to be used by DOE to make the findings required by DPA Section 101(c)(2)(A). This priorities and allocations authority was used for contracts and orders to build and repair the Trans Alaska Pipeline System in the 1980s/early 1990s. A memorandum of understanding between DOE and DOC spells out the respective jurisdictions and responsibilities of these two departments for products and equipment associated with the production of petroleum and gas.

10 CFR Part 221 sets forth the procedures to be used by the Economic Regulatory Administration, within DOE, and DOD whenever the priority supply of crude oil and petroleum products is necessary or appropriate to meet national defense needs.

DOE planning and procedures to address energy resources preparedness and response for emergency conditions are addressed in ESF #12 (Energy) of the NRF and the ESF #12 Operations Manual. The Operations Manual provides information resources and instructions for

the DOE/OE Energy Emergency Management Team. It can be used to support planning and response activities during an energy emergency or upon activation of ESF #12. It provides general information and guidelines for OE that can be tailored to event-specific circumstances. The manual is currently being updated with references to DPA authorities, including Section 101. These authorities are also addressed in the NRF.

DOE has been involved in updating DPAS guidance, and has coordinated DOE's recent amendments to the DPAS regulation. DOE revised 10 CFR Part 216 (Materials Allocation and Priority Performance Under Contracts or Orders to Maximize Domestic Energy Supplies), which implements DOE's authority under DPA Section 101(c), to reflect statutory amendments that broadened the scope of 101(c) authority, and DOE updated the delegation of Section 101(c) to the Office of Electricity Delivery and Energy Reliability. DOE has also incorporated a section on the DPA and the DPAS in DOE responder training to alert responders to the potential use of DPAS priority ratings to expedite deliveries of industrial resources under emergency conditions.

DOE also recognizes other DPA authorities as important tools for protecting and restoring critical energy infrastructure. Voluntary agreements, authorized under DPA Title VII, have been used in the past to enable oil companies to prepare for, and respond to, energy supply problems, including participation in the International Energy Agency's (IEA) standby emergency preparedness programs. Participation by oil company in these IEA programs is now covered by voluntary agreement provisions included in section 251 of the Energy Policy and Conservation Act. However, the DPA's voluntary agreement authority could still be important for addressing domestic energy emergencies, such as widespread damage to energy production or delivery systems caused by acts of terrorism or natural disasters. DPA Title III authorities could also be used for protection of energy infrastructure. For example, these authorities might be used, under the right circumstances, to establish more agile production capabilities for critical items required for quick restoration of electric power generation and distribution capabilities.

3.5. *Department of Health and Human Services*

HHS is delegated authority by the President to require acceptance and priority performance of contracts and orders with respect to health resources through subsection 201(a) of E.O. 12919. Health resources are identified in E.O. 12919 as "materials, facilities, health supplies, and equipment (including pharmaceutical, blood collecting and dispensing supplies, biological, surgical textiles, and emergency surgical instruments and supplies) required to prevent the impairment of, improve, or restore the physical and mental health conditions of the population."

Section 201(a)(6) of E.O. 12919 delegates to the Secretary of HHS the President's authority under Section 101 of the DPA to require acceptance and priority performance of contracts and orders with respect to health resources.

HHS has also considered use of the provisions of the DPA (50 U.S.C. App. 2158), entitled "Voluntary agreements and plans of action for preparedness programs and expansion of production capacity and supply," and E. O. 12919 that provide the Secretary with the authority to enter into voluntary agreements and plans of action with entities in the public sector to address direct threats to the national defense. If the DPA confers legal protections upon participants for actions, such agreements could be helpful as they participate in the development or carrying out

of a DPA voluntary agreement (e.g., violation of antitrust laws, including any similar law of any State.)

HHS is the Coordinator for ESF #8 (Public Health and Medical Services) of the NRF. ESF #8 provides for coordinated Federal assistance to supplement State, Territorial, Tribal, and local resources in response to a public health and medical disaster or other potential health and medical emergencies. HHS provides leadership in directing, coordinating, and integrating all Federal efforts to provide medical and public health assistance to an affected area.

Additionally, HHS has been designated the Sector-Specific Agency for the Health Care and Public-Health Sector for the NIPP and is responsible for identifying, prioritizing, and protecting Health Care and public-health critical infrastructures and key resources, many of which are in the private sector. While focusing on protection issues, HHS must also promote the resiliency of the sector, and the critical networks, systems, function and assets within the sector.

3.6. *Department of Homeland Security*

In December 2005, DHS/FEMA requested that DOC update DPAS Delegation 4 to cover the spectrum of DHS programs eligible for DPAS support. In March 2006, the revised delegation was issued by DOC/BIS. It authorizes and provides a procedure for handling requests from owners and operators of critical infrastructure to place priority rated contracts and orders for industrial resources in support of critical infrastructure protection and restoration activities. Delegation 4 also provides procedures for use of priority ratings in support of: (1) approved DHS programs; (2) state, local and tribal government programs that involve disaster preparedness, mitigation, response, and recovery activities; and (3) programs of other Federal department and agencies that involve essential civilian needs determined by DHS to be necessary or appropriate to promote the national defense. The previous DPAS Delegation 4 had been issued to FEMA in 1998 and did not account for the broadened DPA definition of “national defense” to include “critical infrastructure protection and restoration.”

In June 2006, the FEMA Administrator, acting under authority delegated by the Secretary of Homeland Security, determined that eight categories of homeland security programs, including critical infrastructure protection and restoration, are approved for DPAS support. These eight approved program categories are:

- Federal emergency preparedness, mitigation, response, and recovery
- State, local, tribal government emergency preparedness, mitigation, response, and recovery
- Intelligence and warning systems
- Border and transportation security
- Domestic counter-terrorism, including law enforcement
- Chemical, biological, radiological, and nuclear countermeasures

- Critical infrastructure protection and restoration
- Miscellaneous.

DHS is in the process of establishing policies and procedures to fully implement its priorities and allocations authorities. This process has included:

- Analyzing DOD's use of the DPAS for lessons learned;
- Drafting a DHS Management Directive to provide guidance and procedures for DPA activities.
- Developing a DHS DPA/DPAS website.
- Drafting a priorities and allocations manual and training materials that describe procedures for implementation of DPAS Delegation 4 authorities within DHS.
- Preparing a new regulation on the use of DPA priorities and allocations authorities on essential civilian needs.

3.7. *Department of Transportation*

DOT is delegated DPA Section 101 authority with respect to all forms of civil transportation. Civil transportation is not covered by the DPAS, but the DPAS has been used in the past to expedite the delivery of industrial resources for protection and restoration of transportation facilities. DOT has prepared DPA orders for civil transportation that can be issued quickly in times of crisis. In addition, the Department ensures that senior leadership and necessary decision-makers are briefed on the applicability of the DPA and DPAS. The Federal Aviation Administration (FAA) Crisis Management Handbook contains a section to coordinate requests for the use of the DPAS, as necessary. DOT planning and procedures to address civil transportation preparedness and response for emergency conditions are addressed in ESF #1 (Transportation) of the NRF, which also addresses use of DPA authorities under emergency conditions.

The U.S. Maritime Administration (MARAD) has four long-established regulations derived from the DPA and relevant executive orders:

- 46 CFR Part 340—Priority Use and Allocation of Shipping Services. This regulation is designed to ensure that DOD will have access, as necessary, to shipping services and port facilities in crisis or war.
- 46 CFR Part 345—Restrictions Upon the Transfer or Change in Use or in Terms Governing Utilization of Port Facilities. This regulation requires prior approval of the National Shipping Authority (NSA) – MARAD's emergency operations mode – to transfer or change utilization of port facilities, "to meet the requirements of the national security."

- 46 CFR Part 346—Federal Port Controllers. This regulation prescribes the standard form of agreement between the NSA and port authorities for the appointment and functions of Federal Port Controllers during national defense emergencies.
- 46 CFR Part 347—Operating Contract. This regulation prescribes the standard form of contract to be entered into between the NSA and marine terminal operators during civil defense emergencies or national emergencies declared by the President.

3.8. *Use of Priorities and Allocations for Protection and Restoration of CI/KR Operations*

Federal departments with DPA Section 101 responsibilities are continually engaged in planning to support critical infrastructure/key resource protection and restoration. In addition, the Defense Priorities and Allocations System has been utilized to support critical infrastructure protection and restoration. This section highlights a number of DPA-related actions in recent years involving critical infrastructure.

3.8.1. Industrial Resources

DPAS Delegation 4 authorizes DHS to place priority rated contracts and orders in support of DHS and State, local, and tribal government programs determined eligible by DHS for DPAS support. As stated previously, the Secretary of Homeland Security re-delegated this authority to the DHS/FEMA Administrator. Both DHS/FEMA and DOC are involved in DPAS actions involving use of priority ratings by other Federal agencies or owners and operators of critical infrastructure for civilian programs involving emergency preparedness or critical infrastructure operations. DHS/FEMA makes a finding and determines in writing that the program is “necessary and appropriate to promote the national defense” and requests that DOC authorize use of a DPAS priority rating to support the civilian program, as appropriate. There have been several cases involving use of the DPAS in support of emergency preparedness and CI/KR, including:

- Restoration of rail service in the Gulf Coast region after Hurricane Katrina (CI/KR sector – Transportation Systems);
- Restoration of levies and waterways in the Gulf Coast region after Hurricane Katrina (CI/KR sectors – Dams/Emergency Services);
- Perimeter security equipment for a major East coast airport and seaport (CI/KR sector – Transportation Systems);
- Construction of the Federal Bureau of Investigation’s (FBI) Northern Virginia Resident Agency facility (CI/KR sector – Government Facilities);
- State Department’s Domestic Facilities and Personnel Protection Program (CI/KR sector – Government Facilities);

- Construction of the Department of Justice’s Terrorist Screening Center (CI/KR sector – Government Facilities);
- DHS/FEMA’s Gulf Coast recovery operations in support of State evacuation centers (CI/KR sector – Emergency Services);
- State Department’s Continuity of Operations (COOP) Facility (CI/KR sector – Government Facilities);
- Transportation Security Administration’s (DHS/TSA) Transportation Threat Protection Program (involving airport explosive detection systems) and Information Technology Managed Services Program (involving commercial airport to TSA Headquarter data processing and communications systems) (CI/KR sector - Transportation Systems);
- DHS/FEMA’s Continuity of Operations and Continuity of Government facilities (CI/KR sector – Government Facilities); and
- Customs Service’s Automated Commercial Environment Program (involving seaport data processing and communications systems to track containerized cargo) (CI/KR sector - Transportation Systems).

3.8.2. Civil Transportation

DOT considers using DPA authorities in any event affecting the national security that requires extraordinary actions to restore or retain critical transportation capabilities. Because the nation’s transportation system is robust, actual uses of these authorities have been limited.

During the first Gulf War, the FAA, working through DOD, sought use of DPAS to support activation of the Civil Reserve Air Fleet. This request was made after the Air Mobility Command determined that air carriers could provide more resources if they could get priority for parts. Additionally, a DOD priority rating was used to expedite one carrier's airframe modifications to enable it to transport pallets used by DOD.

Most recently, DOT, DOC, and DHS/FEMA discussed possible use of the DPAS during planning for the I-35W Bridge replacement (following the bridge collapse in Minnesota) and general use to support contracting activities during an emergency.

3.8.3. Energy Resources

DOE has not encountered emergency conditions requiring use of DPA Sections 101(a) and 101(c) authorities to reduce interruptions in energy supplies caused by natural or man-caused disasters since the DPA definition of “national defense” was expanded in 2003 to include “critical infrastructure protection and restoration.” DOE has considered use of these authorities in response to a number of emergency preparedness and disaster response cases, but determined in each case that priorities or allocations action was not needed to protect or restore the impacted energy supplies. For example, DOE and DOC considered use of DPAS priority ratings to speed restoration of refinery operations interrupted by flooding and fire during the summer of 2007.

The fact that these authorities have not been used in recent years for protection or restoration of energy resources does not lessen their potential importance for addressing energy supply problems caused by catastrophic disasters or other threats to national defense and homeland security.

In cooperation with DHS, DOC, and DOD, DOE has been planning and exercising use of these authorities for emergency conditions. In June 2007, a DPAS representative from DOC participated in DOE's Northeast-Mid Atlantic States Energy Assurance Exercise to enhance "play" of DPAS issues. DPAS was discussed in several cases, raising participant awareness of how Section 101 authority could be used under emergency conditions.

3.9. Conclusion

The DPA Statement of Policy and DPA authorities focus primarily on DOD acquisition needs and support for major military conflicts overseas. Except for the 2003 amendment to the DPA definition of "national defense" to include "critical infrastructure protection and restoration," no other changes have been made to DPA policy or authorities to address CI/KR operations.

DPA authorities, particularly the Section 101 authorities, have been used for critical infrastructure protection and restoration. Examples of such use were provided in this chapter. Federal departments with authority for priorities and allocations have been updating their procedures to use this authority for preparedness and CI/KR-related activities. Beyond the actual uses of priority ratings to support CI/KR operations, an increasing level of attention is being given to DPA authorities as tools for a full spectrum of emergency preparedness, response, and recovery activities, including critical infrastructure protection and response.

Appendix A. Acronyms

APAS	Agriculture Priorities and Allocation System
CEFR	Code of Emergency Federal Regulations
CI/KR	Critical Infrastructure and Key Resources
CISP	Critical Infrastructure Security Program
COOP	Continuity of Operations
DFOs	Defense Food Orders
DHS	Department of Homeland Security
DHS/FEMA	Department of Homeland Security/Federal Emergency Management Agency
DHS/IP	Department of Homeland Security/Office of Infrastructure Protection
DIB	Defense Industrial Base
DOC	Department of Commerce
DOC/BIS	Department of Commerce/Bureau of Industry and Security
DOD	Department of Defense
DOE	Department of Energy
DOT	Department of Transportation
DOT/TSA	Department of Transportation/Transportation Security Administration
DPA	Defense Production Act of 1950
DPAS	Defense Priorities and Allocations System
E.O.	Executive Order
EPA	Environmental Protection Agency
ESF	Emergency Support Function
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
GSA	General Services Administration
HHS	Department of Health and Human Services
HSPD	Homeland Security Presidential Directive
IEA	International Energy Agency
ISER	Infrastructure Security and Energy Restoration Division
MARAD	Maritime Administration
NIPP	National Infrastructure Protection Plan
NRF	National Response Framework
NSA	National Shipping Authority
OE	Office of Electricity Delivery and Energy Reliability
PG&E	Pacific Gas and Electric Company
REID	Rotating Equipment Isolation Device
SSAs	Sector-Specific Agencies
SSPs	Sector-Specific Plans
USACE	United States Army Corps of Engineers